IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHN MORGAN AND JEANETTE MORGAN, husband and wife,	:	
Plaintiffs,	:	
	:	C.A. No. 03C-12-268 SCD
v.	:	
CONECTIV, a Delaware corporation, et al.	:	
Defendants.	:	

ORDER

There are two matters now pending. I heard argument on January 13, 2006, regarding Delmarva Power and Light's Motion to Compel Discovery and for Sanctions. I heard argument on March 3, 2006, on Defendants' Joint Motion to Strike Expert Reports Filed by Plaintiffs after the Court Ordered Deadline. This is my decision on both matters.

This action arises from an accident which occurred when John Morgan ("Morgan") came in contact with a high power line while working on a pole relocation project on February 4, 2002. Morgan was employed by Danella Line Services ("Danella"). Danella has a substantial workers' compensation lien because of a large deductible, as does its workers' compensation carrier, American Contractor Insurance Group ("ACIG").[1] Both Danella and ACIG are represented in this action by R. Stokes Nolte, Esquire.

The plaintiffs are represented by Samuel J. Pace, Esquire ("Pace"). Pace initially represented Danella, and approximately thirteen days after the accident, was asked to represent

[1] Hearing on Delmarva Power and Light's Motion to Compel discovery and for Sanctions, 14:10-23, 15:1-11, Jan. 13, 2006.

Morgan, though Morgan's condition did not permit a formal agreement of representation until a number of weeks later.[2] A recurring theme in the numerous discovery disputes that have arisen in this case revolves around the fact that Pace claims attorney privilege of investigative materials generated by Danella. I am aware of no investigation conducted by Pace as counsel for the Morgans other than the employment of Alexander Deveney, ("Deveney") who was initially employed by Danella, and now works for Pace.

I have conducted two *in camera* reviews of documents in this case. On each occasion, I have ordered the production of documents.[3] The produced documents focus on statements taken from eyewitnesses related to the high wire lines, and the circumstances of the accident.
The defendants seek a motion to compel and sanctions because the documents produced as a result of the *in camera* reviews indicate that certain witnesses whose depositions have been taken, gave different statements immediately after the accident. The delay in the production of the statements resulted in the defendants taking depositions without the opportunity to confront witnesses about previous statements they are recorded as having made.

The defendants sought discovery of privileged materials. Because the argument centered on Deveney, the only individual then known to the defendants as having an opportunity to take statements, I ordered an *in camera* production. Only Deveney materials were supplied to me.[4]

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[2] The commencement of Pace's representation has been fuzzy. While he said at the January 13, 2006, hearing that his representation of Morgan started thirteen days after the accident, he was confronted with a letter dated August 2, 2004, wherein he says that he represents Danella and the Morgans.

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Pace explained, "I think I misspoke there. I'm representing Danella to the extent if we generate a fund Danella will be compensated out of that fund. And that's what I meant there. I may have misspoke there."
Hearing on Delmarva Power and Light's Motion to Compel and for Sanctions, 89-90, 98, Jan. 13, 2006.

[3] *See Morgan v. Conectiv*, *et al.*, Del. Super.., C.A. No. 03C-12-268, Del Pesco, J. (Oct. 7, 2005) (ORDER). *See* Letter from Judge Susan C. Del Pesco to Michael L. Sensor, Esq., Lisa C. McLaughlin, Esq., Robert S. Goldman, Esq., Colin M. Shalk, Esq., R. Stokes Nolte, Esq. and Kathleen M. Jennings-Hostetter, Esq., (Mar. 15, 2006).

[4] Hearing on Delmarva Power and Light's Motion to Compel and for Sanctions, 64:1-21, Jan. 13, 2006.

Plaintiffs sent interrogatories asking for information regarding statements of eyewitnesses and people with knowledge of the accident. The plaintiffs failed to inform the defendants that a grief counselor had met with eyewitnesses, that a former Danella employee, Steve Benjamin had taken some statements, that a man named Chris Bullock conducted an investigation in connection with the payment of workers' compensation benefits, and that the OSHA investigator may have provided information to Danella regarding the factual basis for the comment in the OSHA report that Morgan was the cause of his own injuries.

Pace was questioned at the January 13, 2006 hearing about his efforts to secure information that was responsive to the defendants' interrogatories. He appears to think that his discovery obligations are limited to that which is conveniently located in his file.[5] Danella seems to have suffered from the same affliction.[6] There is a pattern of discovery delay, approaching

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[5] The Court: And you don't know anything about the grief counselors with the possible exception of what Mrs. Morgan said?
Mr. Pace: Right, which they've known for a year or more than a year.
The Court: You're saying to me you haven't had unfettered access to the Danella files?
Mr. Pace: Absolutely not. I mean could I have if I asked? Maybe. But it's not my obligation to ask.
The Court: That's a bad thing to say.
Mr. Pace: I'm being completely honest. If I had called Danella and said I want to see the file I don't know what they would have done, but I didn't.
The Court: Let me tell you why that's a bad thing to say. Think it through. Discovery doesn't happen to be just what's in your file.
Mr. Pace: It's what I have control over. I don't have control over that. I could have called Liberty Mutual. I could have called a lot of people. I could have filed a freedom of information act and got whatever the state police have but I don't have to do that in response to a discovery request.
The Court: Why do you think you don't have to do that?
Mr. Pace: I have to call the Delaware State Police and say give me your report because the plaintiffs want it?
The Court: Wait a minute. Don't change the question.
Mr. Pace: Why is it different?
The Court: Why do you not have an obligation when you're in this Court and there is a claim here for injury and there is a substantial lien and your guys are working together, why do you believe you don't have an obligation to ask Danella for access to their files?
Mr. Pace: Well, because they're not my client. It was pointed out –
The Court: Okay. You've answered the question. I will speak to Mr. Nolte about it.
Hearing on Delmarva Power and Light's Motion to Compel and for Sanctions, 46:1-23, 47:1-20, Jan. 13, 2006.

[6] Mr. Nolte: This is the information that was developed during the Benjamin deposition. That deposition occurred December 19th, 2005. I have asked – prior to the Steve Benjamin deposition I discussed with Mr. Deal,

deception. I find that Danella has redacted information, and withheld information until forced to produce it.[7] Once I issued the Order of October 7th, 2005, it should have been clear to plaintiffs and Danella that the reasoning I gave would apply to information secured from other investigators as well.

It appears that Mr. Nolte understood the implications of my decision when he arrived at the deposition of Steven Benjamin with a note not previously produced, and not identified in a meaningful way in the prior listing of documents considered privileged.[8] The document included the following statement from Mr. Tejeda "saw John [Morgan] move bucket up; he was facing me and he reached up and grabbed wire; wire was shoulder height." Clearly, that is a statement critical to the central dispute in this case.

I took the matter of sanctions under advisement, ordered that other documents be produced *in camera*, and directed that Danella pay for the re-taking of the deposition of Tejeda within 30 days. As far as I know, that deposition has not yet been taken. The other two individuals who are considered eyewitnesses, Harry Stigler and Steve Lopala have been deposed,

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who was Mr. Benjamin's boss, Mr. Pancoast, who was also at Total Risk Management, who was a coworker of Mr. Benjamin, I discussed with Mr. Carr and discussed with the present claims adjuster extensively what the company knew and what the company didn't know.

And until Mr. Benjamin advised me or advised everyone on December 19th that he had been approached by two witnesses who originally indicated they didn't see anything and then – and this is Mr. Stigler and Mr. Lopata – and they changed their testimony, that that's the first time that I was made aware that this information existed.
Hearing on Delmarva Power and Light's Motion to Compel and for Sanctions, 57:21-23, 58:1-15, Jan. 13, 2006.

[7] Ms. McLaughlin: We had received his final report. As part of the in camera action we received his earlier report. That report according to Mr. Deveney was intentionally altered at the direction of Mr. Pace and Danella to eliminate facts and conclusions that, when we go through them, relate directly to Mr. Morgan's intentional conduct.

We were never provided this information before. This information deals with, as I already indicated to Your Honor, the grief counselor and the first reliable information about eyewitnessing the accident from Mr. Tejeda that was contained in the report that I showed to Your Honor.
Hearing on Delmarva Power and Light's Motion to Compel and for Sanctions, 17: 18-23, 18:1-18, Jan. 13, 2006.

[8] Hearing on Delmarva Power and Light's Motion to Compel and for Sanctions, 62:2-23, 63:1-20, 74-75, Jan. 13, 2006.

and will have to be re-deposed. Plaintiffs are jointly and severally responsible for the cost of re-taking the depositions of Lopala and Stigler.

The defendants have filed a motion to strike any expert reports filed by plaintiffs after the deadline. The lack of expert reports was the basis for the continuance of the trial in this case from October 24, 2005 to November 27, 2006. I set a new deadline for plaintiffs' expert reports of December 9, 2005.[9] The parties stipulated to an extension of the deadline to January 13, 2006 and an extension of defense experts to February 13, 2006.

Plaintiffs did not file a supplemental expert report (supplemental because the previously filed report was the subject of the 2005 trial continuance) by the deadline of January 13, 2006. On February 8, 2006, plaintiffs provided reports dated November, 2005. Morgans' counsel explained that he thought it was implicit in the spirit of cooperation that "we could wait to do final expert reports until discovery was completed."[10]

The parties now ask the Court to extend the various dates in the case management order for a third time.[11]

The law is clear that parties have a duty to make a reasonable effort to assure that a client has provided all the information and documents available that are responsive to discovery.[12] By not clearly identifying persons who were paid by Danella, and were known by Danella to have

[9] *Morgan v. Conectiv, et al.*, Del. Super., C.A. No. 03C-12-268, Del Pesco, J. (Aug. 19, 2005) (ORDER).

[10] Hearing on Defendants' Joint Motion to Strike Expert Reports Filed by Plaintiffs after the Court Ordered Deadline, 6:11-14, (Mar. 3, 2006).

[11] Letter from Lisa C. McLaughlin, Esq., Phillips, Goldman & Spence, P.A., to Judge Susan C. Del Pesco (Mar. 30, 2006).

[12] *E.I. DuPont de Nemours and Co. v. Admiral Ins. Co., et al.*, 1994 WL 319067 at *3, (Del. Super. Ct. 1994). *See also Crowhorn v. Nationwide Mutual Ins. Co.*, 2002 WL 388115 at *2 (Del. Super. Ct. 2002).

investigated this incident, Danella, and Pace, because he represented Danella for a period of time after this accident, have not complied with the obligations of discovery.

Here are my findings. Plaintiffs are responsible for the delay in discovery and plaintiffs failed to produced their expert reports in a timely fashion. The consequence of their conduct is that the defendants have been unable to complete discovery of key witnesses, and did not receive plaintiffs' expert reports in a timely fashion.

My review of the transcripts from the arguments persuades me that the factual testimony regarding statements made at the scene is a small part of the considerations addressed by the defense experts. Plaintiffs have told the Court that even if Morgan is found to have intentionally come in contact with the high-voltage wire, he will prosecute the case on the basis that Morgan was misinformed about which lines were energized.[13]

The plaintiffs must live with the expert reports which have been produced. No further opinions will be permitted. The defendants will live with the reports they have provided except to the extent that they need to supplement their report based on something in the November, 2005 report, produced in January, 2006. The discovery is closed except as to depositions or document discovery related to Tejeda, Stigler, Lopala, the grief counselor, Steve Benjamin, Chris Bullock and the OSHA investigator. Plaintiffs may not notice any depositions or initiate other discovery without leave of the Court, except that plaintiffs may depose defense experts.

The Case Management Order is again amended as follows: the specified fact discovery and expert depositions are to be completed by April 28, 2006; dispositive motions and *Daubert* motions are to be filed by May 30, 2006. The balance of the deadlines remain the same.

[13] Hearing on Delmarva Power and Light's Motion to Compel and for Sanctions, 87:9-17, (Jan. 13, 2006).

The parties are **again** instructed NOT to bring motions on the Court's routine Friday calendar. Motions are to be scheduled with my secretary.

I decline the defendants' request to bar the workers' compensation carrier from seeking recovery of its lien at this time. Depending on the facts as they develop at trial, when I will have a better understanding of the prejudice resulting from the delay in disclosing the investigation, I may reconsider my earlier decision regarding the OSHA report, and may impose additional sanctions, such as counsel fees attributable to waste associated with the discovery delay.

IT IS SO ORDERED this 28th day of March 2006.

/s/ Susan C. Del Pesco
Judge Susan C. Del Pesco